UNITED STATES OF AMERICA NATIONAL LABOR RELATIONS BOARD

WYMAN GORDON TRU-FORM, LLC, Employer,

and

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED-INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO/CLC,

Union.

Case Nos. 04-CA-182126

04-CA-186281 04-CA-188990

PROPOSED-INTERVENORS' BRIEF IN SUPPORT OF MOTION TO INTERVENE AND EXCEPTIONS

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INTRODUCTION

In November 2016, Wyman Gordon Tru-Form ("Wyman") withdrew recognition from the United Steel Workers ("Union" or "USW") upon receiving a decertification petition signed by the majority of its employees. Proposed Intervenor William Berlew ("Berlew") was one of the primary circulators of that petition and was one of the driving forces behind the collective employee effort to rid their workplace of the Union. He and other petition signers expressed continuing and longstanding opposition to USW representation, beginning with its original organizing campaign (and even earlier). Berlew attempted to intervene in the case and participate in the hearing to authenticate the petition he helped to circulate. The ALJ denied his motion to intervene on the sole basis that his Section 7 rights were protected and represented by his employer.

The key questions in this case are whether intervention should have been granted, and did the petition circulated by Berlew and his co-workers serve as a lawful basis for Wyman's withdrawal of recognition from the Union?

Within his small bargaining unit of forty-three employees, Berlew circulated a petition containing four signature pages. The first page includes a declaration that the employees no longer wish to be represented by the Union and that if more than 50% sign they request the employer withdraw recognition from the Union. The other three pages of the petition contain signature lines. Berlew and other unit employees who circulated and signed the petition stated they circulated the petition as a packet and that the first page of the petition was always present and explained when employee signatures on the other pages of the petition were collected. (Tr. 176:3-10; 782-83:25-23, 805-06, 818-20).

In the face of this testimony, the ALJ found that because some of the petition pages lacked language, the signature pages could not be used to support decertification without further testimony and evidence. The ALJ made this finding despite clear, consistent, and credited testimony from several of the signatories that they understood they were signing a decertification petition and that the language on the first page was always present as part of the petition packet.

While the ALJ credited testimony establishing that fifteen of the employees signed the petition with the intention to decertify the Union, several employees who signed the petition did not testify. Relying on the absence of some petition signatories taking the stand, coupled with his inclination to "credit" one hostile witness's contrary testimony over the weight of all the evidence in the record, the ALJ declared that eight out of the twenty-three signatures on the petition were not properly authenticated. ALJ Dec. at 9. As the ALJ found there was only proof that fifteen out of forty-three employees opposed the Union, the petition could not be used to withdraw recognition. ALJ Dec. at 9

The ALJ's conclusion suffers from several defects. First, all employees who testified (with one exception) stated they signed the petition because they understood it to be a decertification petition. The one employee who testified otherwise—Steve Brotzman—gave incredible testimony and lied on the stand about the reason for his termination from employment. Second, the ALJ, without any record evidence, made several extra record assumptions that the petition's first page could not have been present at several of the later signings. ALJ Dec. at 6-9. The ALJ reached this conclusion on the basis that different employees could not have collected signatures with the complete petition during the same time frame. Yet, the ALJ based this conclusion upon false suppositions, not upon any evidence admitted to the record. Indeed, the ALJ ignored other consistent testimony to reach these foregone conclusions. Based on these

gymnastics, the ALJ refused to credit the signatures of five employees on the petition (Brian Mikolosko, Joseph Petorak, Bryan Filipkoski, Greg Cook, and Robert Wallace). Additionally, the ALJ refused to credit at least two signatures (Timothy Ancherani and Kevin Foster) based on his perceived lack of direct testimony concerning how their signatures were collected on the petition.

The ALJ's denial of intervention at the beginning of the hearing precluded the very petition verification testimony that is the foundational predicate for all of the ALJ's adverse findings. Berlew and his fellow signatories have been prejudiced by the ALJ's failure to allow his intervention. Had Berlew been a full party, he would have had the standing to call witnesses to authenticate his petition. Accordingly, Berlew should be granted full-party status, and the Board should reopen the hearing to reverse this deprivation of procedural due process to the party with the largest stake and interest in this proceeding, so Berlew can call his fellow petition signatories to the witness stand to authenticate their petition.

FACTS

A. Background and bargaining

On May 21, 2014, the Union won an election at Wyman by the narrowest of margins, a vote of 24-22. After the Union was certified in 2015, Rick Grimaldi, Wyman's attorney and lead negotiator, reached out to Union representative Joe Pozza to begin negotiations. Grimaldi proposed bargaining dates beginning in August 2015 (and may have proposed meeting sooner). (Tr. 704:16-20) (Wyman Ex. 4). He was rebuffed and told the Union could not commence negotiations until the fall of 2015. (Tr. 615-16).

By the fall of 2015, employee morale towards the Union was low, especially given the narrow margin of victory in the election. Union President and bargaining committee member

Brian Callora testified that when the Union held its first meeting in the fall of 2015 (eighteen months after the election), only twelve employees showed up. (Tr. 81:1-8). He testified to being "pleasantly surprised" by even that paltry turnout. (Tr. 101:14-15). After this single meeting, the Union did not hold another employee meeting until nearly a year later. (Tr. 81:1-8). It did not send out bargaining updates to the represented employees until August 3, 2016, after the parties had met to bargain *thirteen times* for close to a year. (G.C. Ex. 6).

In September 2015, the parties finally met to negotiate a first contract. They met in twenty-fie negotiating sessions over the next year, and reached several tentative agreements. (Wyman Ex. 63).

B. Collection of the decertification petition

In October 2016, Berlew began circulating a decertification petition. Berlew had longstanding and principled opposition to the Union; he was an open and public opponent of the Union during its organizing effort, often wearing an anti-union t-shirt to work. (Tr. 167:4-13).

Berlew, along with co-workers Josh Antosh and Mike Shovlin, collected bargaining unit employee signatures on the decertification petition. On its face, the petition unequivocally states that the employees wish to decertify the USW at Wyman and, that if over 50% of the employees sign, they request Wyman to withdraw recognition from the USW. (Wyman Ex. 2). While the language appears on the first page of the four-page petition, Berlew, Shovlin, and others testified that when they collected the petition, the first page of the petition was always present and that every employee read the petition and knew they were signing an anti-union petition. (Tr. 176:3-10; 782-83:25-23, 805-06, 818-20).

It is undisputed that the petition was created, circulated, and signed without any employer support or interference. Berlew collected several signatures in the break room, while Shovlin

collected signatures at his truck and at offsite locations (Tr. 175:21-22; 805-06, 818-20). Josh Antosh collected Kevin Foster's signature as well. (Tr. 774:6-7). Based on that majority petition, Wyman withdrew recognition from the Union in late November 2016.

STATEMENT OF QUESTIONS INVOLVED

- (1) Whether the ALJ erred in denying Berlew's Motion to Intervene in the proceedings and should the hearing be re-opened? (Exception 39).
- (2) Whether the ALJ ignored the weight of the evidence in crediting Steve Brotzman's testimony, and whether the ALJ was wrong to discredit Berlew and Shovlin's testimony? (Exceptions 1-4, 6-26, 30-32, 41).
- (3) Whether the petition presented by Berlew to Wyman could be used to support a withdrawal, given the language supporting withdrawal appears on page one of the four-page packet? (Exceptions 5, 27-32).
- (4) Whether the ALJ erred in recommending the Proposed Remedy and Order, and should any proposed remedy be an election? (Exceptions 35-38, 40, 42-43).
- (5) Whether the ALJ erred in finding the petition was tainted by Wyman's bargaining? (Exceptions 33-34).

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¹ When questioned if he had anyone sign the petition, Antosh testified: "I got one individual I talked to that signed this paper" (Tr. 774:6-7). The transcript does not reference that Antosh was referring to Foster's signature on the last page of the petition. (Wyman Ex. 2).

ANALYSIS

I. The ALJ erred by refusing to grant intervention.

The ALJ ruled that Berlew could not intervene and be a full participant in the unfair labor practice case because "Berlew's interests are adequately represented by Respondent [it] has every incentive to litigate fully and adequately its defenses that it did not violate the Act as alleged and that it legally withdrew recognition from the Union." ALJ Order, Mar. 14. (Ex. 1).

But, as Berlew has argued at every turn, Wyman could not and did not represent his interests. In fact, Wyman made strategic litigation decisions during the hearing that were directly contrary to his interests and Section 7 rights to get out of an unwanted union. That includes Wyman's refusal to call additional witnesses to explain, authenticate, or introduce Berlew's majority withdrawal petition. The failure of Wyman to call additional witnesses undermined Berlew and the other employees' separate interests in this case.²

Berlew contends the ALJ erred for three reasons: (1) he and other employees who signed the petition have a substantial stake in the outcome of the litigation because they do not want their rights to be harmed by a minority union; (2) his interests cannot be (and were not) protected by Wyman during the hearing; and (3) due process requires intervention be allowed.

A. The Board arbitrarily grants or denies intervention in unfair labor practice cases.

Under current NLRB practice, ALJs retain nearly complete discretion in granting individual employees the right to intervene in unfair labor practice cases. ALJs have rendered inconsistent decisions to grant or deny recognition. *See*, *e.g.*, *Novelis Corp.*, Case No. 03-CA-

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² Berlew does not concede that Foster and Ancherani's signatures were not properly verified, nor that the rest of the signatures were not properly verified through Berlew and Shovlin's testimony. But, even so, Berlew would have done more than Wyamn to verify those signatures during the hearing.

121293 (Sept. 12, 2014) (unpublished Order upholding ALJ decision granting employee intervention); *Johnson Controls, Inc.*, Case No. 10-CA-151843, JD-14-16, 2016 WL 626283 (Feb. 16, 2016) (ALJ granted intervention to decertification petitioners); *Renaissance Hotel Operating Co. & Unite Here Local 631*, Case 28-CA-113793 (ALJ Order granting Motion to Intervene, July 18, 2014); *but see Veritas Health Serv.*, 363 NLRB No. 108 (2016) (upholding ALJ denial of intervention); *Latino Express, Inc.*, 360 NLRB 911 (2014) (upholding ALJ denial of intervention); and *Leggett & Platt*, Case No. 09-CA-194057 (Jan. 23, 2018) (unpublished Board Order upholding ALJ denial of intervention). Taken together, these decisions generally lack any coherent explanations and intervention is essentially granted or denied on an arbitrary, *ad hoc* basis.

The Board's failure to delineate a proper standard for intervention has not gone unnoticed. In *Veritas Health Serv. Inc. v. NLRB*, 895 F.3d 69 (D.C. Cir. 2018), the D.C. Circuit disposed of the employer's appeal on grounds that allowed the panel to sidestep the merits of an individual employee's argument that he should have been allowed to intervene. *Id.* at 87. Pertinent here, however, is Judge Millet's concurrence. She wrote: "separately only to express my concerns about the Board's continued failure to establish any discernible, consistent standards for granting and denying intervention in agency proceedings." *Id.* at 89. She correctly noted that the Board's "generic intervention rule . . . provides no substantive standards or guidance at all on when intervention is or is not proper in agency proceeding." *Id.* The lack of standards and guidance leaves "individual intervention decisions at risk of arbitrary and inconsistent resolution." *Id.* She noted that it is "incumbent on the Board to formulate objective and reliable standards for intervention in its proceedings." *Id.*

The General Counsel recently released a memorandum instructing that intervention

motions by employees seeking to protect their decertification petitions should not be opposed by Regional Directors litigating unfair labor practice cases. GC Mem. 18-06 (Aug. 1, 2018). Prior to the release of this memorandum, the General Counsel vigorously opposed Berlew's intervention. Even if the General Counsel is neutral, however, ALJs still possess broad discretion to grant or deny intervention. Thus, it is still necessary for the Board to promulgate standards on when to grant intervention by individual employees.

In formulating standards for intervention, the Board should look to Rule 24 of the Federal Rules of Civil Procedure. Rule 24(a) states:

Upon timely application anyone shall be permitted to intervene in an action when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Id.

Federal courts apply a four-part test to evaluate claims for intervention under that rule: (1) the motion must be timely;³ (2) the applicant must claim a "significantly protectable" interest relating to the property or transaction that is the subject of the action; (3) the applicant must be so situated that the disposition of the action may, as a practical matter, impair or impede its ability to protect that interest; and (4) the applicant's interest must be inadequately represented by the parties to the action. *See, e.g., United States v. City of Los Angeles,* 288 F.3d 391, 397 (9th Cir. 2002); *Fund for Animals, Inc. v. Norton,* 322 F.3d 728, 731 (D.C. Cir. 2003).

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³ The initial motion to intervene was timely filed and Berlew's special appeal on that motion was denied. The Board has allowed putative intervenors to both file motions before the Board for intervention post denial, *Camay Drilling Co.*, 239 NLRB 997 (1978), and as part of exceptions. *Veritas Health Serv.*, 363 NLRB No. 108 (2016). Out of an abundance of caution, Berlew takes both tracks here. If anything, the Board should clarify the method in which putative intervenors may appeal their denial to the Board.

In applying those tests, Rule 24(a) is construed "broadly in favor of potential intervenors," *City of Los Angeles*, 288 F.3d at 397, and in light of the liberal policies favoring intervention. *See also Camay Drilling Co.*, 239 NLRB 997 (1978) (intervention liberally granted to pension fund trustees). This four-part test is satisfied here.

B. Berlew has a substantial stake in the outcome of this litigation and his ability to protect this interest without full-party intervention was wrongfully impaired.

Both the Board and the Supreme Court have emphasized that the primary focus of the NLRA is the expansion and protection of employee rights—not the rights of unions or employers. "The National Labor Relations Board is not just an umpire to referee a game between an employer and a union. It also is a guardian of individual employees. Their voice, though still and small, commands a hearing." *McCormick Const. Co.*, 126 NLRB 1246, 1259-60 (1960) (emphasis added), *quoting Shoreline Enter. of Am., Inc. v. NLRB*, 262 F.2d 933, 944 (5th Cir. 1959). Section 7 "guards with equal jealousy employees' selection of the union of their choice and their decision not to be represented at all." *Baltimore Sun Co. v. NLRB*, 257 F.3d 419, 426 (4th Cir. 2001); *Lee Lumber v. NLRB*, 117 F.3d 1454, 1463 (D.C. Cir. 1997) (Sentelle, J., concurring) ("employee free choice . . . is a core principle of the . . . Act"); *New York New York, LLC*, 356 NLRB 907, 914 (2011); *Leslie Homes, Inc.*, 316 NLRB 123, 127 (1995). "If the rights of employees are being disregarded," it is incumbent upon the Board "to take affirmative action to effectuate the policies of the Act" and ensure that "those rights be restored." *McCormick Const.*, 126 NLRB at 1259.

In this case, Berlew's interest is the invocation of his and his co-workers' core Section 7 right to freely choose or reject a bargaining agent—a right that is the very "essence of Section 7." *McDonald Partners, Inc.*, 336 NLRB 836, 839 (2001) (Chairman Hurtgen, dissenting). The ALJ's recommended bargaining order imposes a minority union back on the employees who

seek to reject it. "There could be no clearer abridgment of § 7 of the Act . . ." than for a union and employer to engage in collective bargaining when a majority of employees do not support union representation. *Int'l Ladies' Garment Workers Union v. NLRB*, 366 U.S. 731, 737 (1961).

The ALJ's recommended bargaining order forces Berlew to accept a mandatory representative. Berlew and other employees cannot challenge the union's minority status until the end of the bargaining bar. Intervention is essential here because Berlew is a key actor in this case, and the only party to the case with Section 7 rights. He led the decertification drive and was directly harmed by the litigation strategies Wyman adopted to authenticate the petition. The NLRA is designed to protect only *his* rights, yet the Board denied his participation in the matter and ruled against his interests allowing him full party status to call his own witnesses. *Lechmere*, *Inc. v. NLRB*, 502 U.S. 527, 532 (1992) ("NLRA confers rights only on *employees*" and any rights a labor union enjoys are merely derivative of the employees' Section 7 rights). In denying intervention here, the Board also ignored this admonition from a federal court of appeals:

The [NLRB] is not just an umpire to referee a game between an employer and a union. It is also a guardian of individual employees. Their voice, though still and small, commands a hearing. The interest of a rank-and-file worker in selecting an economic representative having the power to fix wages and working conditions is no less important than a citizen's interest in selecting a political representative.

Shoreline Enters., 262 F.2d at 944.

Berlew has concrete legal rights at stake in this case. Those statutory rights will be permanently impaired if the ALJ's decision is adopted. This possible outcome is more than enough to sustain his intervention.

C. Wyman's counsel cannot adequately represent the employees' rights.

One of the traditional factors to weigh in deciding a motion to intervene is whether any existing party will represent the intervenor's interests. An applicant in intervention need not show that the existing parties will engage in conduct detrimental to his interests. To the contrary, the requirement of inadequacy of representation "is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be minimal." *Trbovich v. United Mine Workers*, 404 U.S. 525, 538 n.10 (1972) (citation omitted).

Here, the ALJ ruled that Wyman adequately represented Berlew's interests. The ALJ ignored that "inadequate representation can be based on any of three possible grounds: (1) that although the applicant's interests are similar to those of a party, they diverge sufficiently that the existing party cannot devote proper attention to the applicant's interests; (2) that there is collusion between the representative party and the opposing party; or (3) that the representative party is not diligently prosecuting the suit." *United States v. Territory of the Virgin Islands*, 748 F.3d 514, 519-20 (3d Cir. 2014) (citation omitted).

Courts often grant intervention when parties have the same litigation goals, yet have divergent or differing interests for seeking a similar outcome. For example, in *National Farm Lines v. Interstate Commerce Comm'n*, 564 F.2d 381, 384 (10th Cir. 1977), the Court found that intervention by a private party on the side of the government was necessary because the government represented different interests than a private litigant. There, the court found it "impossible" for the government to protect both the public interest and the private interest of the intervenors. The court found "this kind of a conflict satisfies the minimal burden of showing inadequacy of representation." *Id.* Other circuits have adopted this view. *See Sierra Club v.*

Glickman, 82 F.3d 106, 110 (5th Cir. 1994) (because representation of broad public interest does not align with narrower private interest intervention is proper); Conservation Law Found. v. Mosbacher, 966 F.2d 39, 44-45 (1st Cir. 1992) (same); In re Sierra Club, 945 F.2d 776, 779-80 (4th Cir. 1991) (same).

Just as "the government's representation of the public interest generally cannot be assumed to be identical to the individual parochial interest," *Utah Ass'n of Ctys. v. Clinton*, 255 F.3d 1246, 1256 (10th Cir. 2001), neither can Wyman's interest be assumed to be identical to Berlew's Section 7 interests even if they share a common goal. Indeed, to assume so is to reject the central premise of the Act that "there is a fundamental conflict between the interests of the employers and employees engaged in collective bargaining." *Brown Univ.*, 342 NLRB 483, 487-88 (2004); *Boston Med. Ctr. Corp.*, 330 NLRB 152, 178 (1999). This is why the Board and federal courts have resoundingly rejected the notion of an employer serving as the "vindicator of its employees' organizational freedom." *Corrections Corp. of Am.*, 347 NLRB 632, 655 n.3 (2006) (citing *Auciello Iron Works*, 517 U.S. 781, 792 (1996)). By very definition, "[t]he employer has its self-interest to watch over and those interests are not necessarily aligned with those of its employees." *Corrections Corp.*, 347 NLRB at 655 n.3.

Compounding his misapplication of the intervention standard, the ALJ applied a heightened standard to determine whether Wyman adequately represents Berlew's rights. In contrast to the ALJ's determination, the Supreme Court has held that intervenors are only required to make a "minimal" showing that a litigant's representation "may be inadequate" *Trbovich.*, 404 US. at 538 n.10 (emphasis added). "The possibility that the interests of the applicant and the parties may diverge need not be great to satisfy this minimal burden." *Utah Ass'n*, 255 F.3d at 1256. As the Fifth Circuit recently noted "[w]e cannot say for sure that the

state's more extensive interests will *in fact* result in inadequate representation, but surely they might, which is all that the rule requires." *Brumfield v. Dodd*, 749 F.3d 339, 346 (5th Cir. 2014).

Here, the General Counsel contends that Wyman *violated* its employees' Section 7 rights. It is logically inconsistent to conclude that Wyman can simultaneously serve as both the violator and the *vindicator* of its employees' interests. Regardless, even where the employees' interests overlap those of their employer, the defense of those interests will necessarily be undertaken from the unique perspective of each party—and each party may offer very different arguments and rationales for its position. Although Wyman may desire the same result, it cannot be concluded as a matter of law that it has Berlew's best interests in mind, nor adequately protect his position.

This case serves as an example of this very point. Wyman could have verified the petition by calling to the stand all of the signatory employees to discuss how they signed the petition to corroborate the already consistent testimony as to how the petition was collected. Instead, Wyman made a strategic decision to call only a few signatories. The ALJ erred in his assumption that Wyman's and Berlew's interests and arguments were 100% aligned. In fact, Wyman's litigation decisions ended up hurting Berlew's interests. Seizing upon the absence of testimony from other employees, the ALJ jumped to a conclusion that many of the employees' signatures were invalid. Had full intervention been granted, Berlew would have been free to call to the stand additional interested employees to verify the petition, and could have elicited further testimony from witnesses over this single issue. Without intervention and full party status, Berlew was powerless to introduce additional evidence into the record. Berlew's attorneys were present during critical portions of the hearing and were willing to call other witnesses to the stand to verify the petition.

The failure to permit full intervention not only harmed Berlew's rights, but is reversible error. In this regard, this case is like *Ozark Automotive Distributors*, *Inc. v. NLRB*, 779 F.3d 576 (D.C. Cir. 2015), where the Board revoked an employer's valid subpoena, thereby improperly halting the development of the record. The D.C. Circuit reversed the Board, stating:

Of course the company could not have been sure what the subpoenas would have produced. See Shaklee Corp. v. Gunnell, 748 F.2d 548, 550 (10th Cir. 1984) ("There was an erroneous denial of discovery as the matter ultimately developed. Such a denial is ordinarily prejudicial. It is not possible to determine here whether the outcome would have been different had discovery been permitted."). The hearing officer did not conduct an *in camera* review of documents responsive to the subpoenas. As a result, the documents are not part of the administrative record available for judicial review.

Id. at 583. Likewise here, the denial of the Motion to Intervene and the exclusion of Berlew's participation means that significant portions of his withdrawal petition and evidence surrounding its creation are absent from the record. Berlew was denied any opportunity to corroborate his own testimony concerning signatures he collected, or signatures collected by Mike Shovlin. ALD Dec. at 6, 9 (ALJ refusing to authenticate signatures without corroborating testimony from the signatories or other witnesses). Nor was Berlew given an opportunity to call Foster or Ancherani to authenticate their signatures. No one can know exactly what the record would have shown had Berlew's intervention been granted and his testimony and evidence allowed, as he was excluded and disabled from making even any proffers of evidence.

Moreover, under current Board law, the employer can play no role in the inception or circulation of a decertification petition. Only employees can actually participate in the process and collection of a petition. Thus, the relevant evidence pertaining to the validity of the petition is only in the hands of the employees. Without a full, and potentially unlawful, investigation into the Section 7 activities of its employees, an employer has little margin to access the critical information necessary to prevail in a case that challenges the validity of a withdrawal petition.

Thus, an employee's interest in the proceeding that determines the validity of their petition is even stronger than the third-party employer's interest.

D. Due process requires intervention as of right.

The due process clause of the Fifth Amendment requires intervention be granted, because a Board decision denying intervention undermines Berlew's right of free association not to be forcibly represented by a minority labor union. *Mulhall v. IAM Local 355*, 618 F.3d 1279, 1286-87 (11th Cir. 2010) (employee has standing to challenge forced representation by a labor union he opposes); *Int'l Ladies' Garment Workers' Union*, 366 U.S. at 738-39. *See also Gibson v. Fla. Legislative Investigation Comm.*, 372 U.S. 539, 544 (1963) (freedom of association "inseparable" aspect of liberty guaranteed by Due Process clause); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) ("Freedom of association . . . plainly presupposes a freedom not to associate."); *Thomas v. Collins*, 323 U.S. 516, 532 (1945) ("The right thus to discuss, and inform people concerning, the advantages and disadvantages of unions and joining them is protected not only as part of free speech, but as part of free assembly."). These rights are protected by the due process clause of the U.S. Constitution.

To bring a claim under the due process clause, a plaintiff must show (i) deprivation of a protected liberty or property interest, *see Gen. Elec. Co. v. Jackson*, 610 F.3d 110, 117 (D.C. Cir. 2010); (ii) by the government, *see Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999); (iii) without the process that is 'due' under the Fifth Amendment, *see Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976). Denial of intervention under the circumstances of this case would satisfy these criteria.

Berlew has the greatest protected liberty interest at stake in this case: it will determine whether he and his fellow petitioners have the right under the Act to disassociate themselves

from an unwanted union. Employees' right to freely associate with, or reject, a union is fundamental under the Act, 29 U.S.C. §§ 141 and 157, and the Board cannot so cavalierly adjudicate those rights without allowing the directly affected employees to be heard. The right to freely associate or disassociate from a union is not only found in the Act, but within the Constitution as well. *See Mulhall*, 618 F.3d at 1287 ("regardless of whether [an employee] can avoid contributing financial support to or becoming a member of the union . . . its status as his exclusive representative plainly affects his associational rights.") (citation omitted). Because the NLRA gives Berlew the statutory right to be free of forced unionization by a minority union, he is entitled to due process of law under the Fifth Amendment when that right was improperly adjudicated in a manner that harms him. *NB ex rel. Peacock v. Dist. of Columbia*, 794 F.3d 31, 41 (D.C. Cir. 2015) ("certain government benefits give rise to property interests protected by the Due Process Clause").

The General Counsel seeks to impose the USW as the exclusive representative. "[T]he congressional grant of power to a union to act as exclusive collective bargaining representative" necessarily results in a "corresponding reduction in the individual rights of the employees so represented." *Vaca v. Sipes*, 386 U.S. 171, 182 (1967). Berlew opposes such reductions of his liberty and property rights.

"[T]he root requirement' of the Due Process Clause" is "that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest." *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 542 (1985) (quoting *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971) (emphasis in original)). And the core purpose of the NLRA is to protect employee rights *from* employers and unions. Here, the ALJ has denied Berlew the opportunity to be heard in this case.

In short, the Board should reverse the denial of Berlew's Motion to Intervene, and adopt the FRCP Rule 24 standards allowing intervention as of right in this type of case. *See* General Counsel Memorandum 18-06, *see also Veritas Health*, 895 F.3d at 89.

II. The ALJ's unexplained and unsupportable credibility determinations cannot withstand analysis.

A. The weight of the evidence demonstrates that every employee signatory knew he was signing a petition to decertify the Union.

Every employee who testified (with one exception discussed below) stated he knew he was signing a petition to decertify the Union. Shovlin, Crispell, and Finch all gave similar testimony that the employees knew they were signing a decertification petition. They all testified that employees read the first page of the decertification petition in Mike Shovlin's car during the third shift on October 14. (Tr. 791; 782-83; 805-06; 818-20). Indeed, the ALJ found this testimony corroborated and credible. Berlew, Shovlin, and others testified that when they collected the petition, the first page of the petition was always present and that every employee read the petition and knew they were signing an anti-union petition. (Tr. 176:3-10; 782-83:25-23; 805-06; 818-20).

Moreover, there was widespread knowledge within the bargaining unit at Wyman that a petition was being circulated to decertify the Union. Multiple employees gave corroborating testimony that they knew a petition was circulating and there was discussion over whether and

⁴ The ALJ, however, did call attention to a minor alleged discrepancy between Shovlin, Cripell,

the petition while they sat in his truck. Shovlin then put the petition on his passenger seat for people to sign, thereby letting people in his truck. (Tr. 807:18-21).

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and Finch's testimony. The ALJ wrote: "Cripell testified employees got in the truck; Shovlin testified he wouldn't let anyone inside his truck." ALJ Dec. at 5. This is a mischaracterization of Shovlin's testimony. Shovlin testified: "So guys walked out and started walking out and said, could you open your truck. I opened my truck. I proceeded out because I'm not going to let somebody go into my truck, and I showed them, this is what it is." (Tr. 807:5-14). The most logical conclusion from this testimony is that Shovlin was simply saying he was not going to let someone in his truck without his immediate presence, not that he would not allow people to sign

when they would sign it. (Tr. 791-92) (Crispell stated "The word was going on about that. We'd been asking about when the petition was coming. We knew that the petition was made up, was printed, so we wanted to sign it to get the Union out."); (Tr. 825-27) (Cegelka testified he had conversations with Wallace and Ancherani concerning the petition).

There was also unimpeached testimony that the employees were long divided and many disliked union representation. Brian Callora, the Union president, admitted the unit was always divided and that employees on the third-shift had a longstanding dislike for the Union. (Tr. 102:3-11); *see also* Tr. 783 (Finch agreed that it was common knowledge that the third shift had the most anti-union sentiment). Berlew testified without hesitation that he had longstanding opposition to unions in general and opposed both the USW and another union that had attempted to organize the facility. (Tr. 166-67). Similarly, Antosh testified he voted against representation in both elections at the facility. (Tr. 775-76). Cegelka testified he was generally against unions because he had prior negative experiences in other jobs where he was exclusively represented. (Tr. 827:16-18).

The overwhelming weight of the evidence demonstrates that the unit was long divided, deep-seated, anti-union sentiment remained, and the employees knew they were signing a decertification petition and were openly discussing it. Yet, against the weight of all of this evidence, the ALJ credited the testimony of one disgruntled, former employee who claimed he did not understand he was signing a decertification petition.

B. The ALJ improperly credited Brotzman's testimony.

The General Counsel called a terminated employee, Steve Brotzman, to testify he believed he was signing a petition for an election. ALJ Dec. at 5. Brotzman lied on the stand about the reason for his lawful termination and had self-interest, as a terminated employee, to

give false testimony against Wyman. Still, the ALJ improbably credited Brotzman's testimony over the other employees. ALJ Dec. at 5. While the ALJ claims that he based his credibility determinations on the demeanor of the witnesses, ALJ Dec. at 1, in crediting Brotzman and discrediting other witnesses he never again mentions their demeanor. Observation of the witnesses on the stand is not the basis in any of the ALJ's credibility resolutions. Therefore, the Board may independently review these credibility findings, because the Board is as fully competent to review the record testimony and evidence as the ALJ. See Valley Steel Products Co., 111 NLRB 1338, 1345 (1955) ("insofar as credibility findings are based upon factors other than demeanors, in consonance with the policy set forth in Standard Dry Wall Products, the Board will proceed with an independent evaluation"); see also K-Mart Corp. v. NLRB, 62 F.3d 209, 213 (7th Cir. 1995) (declining to uphold boilerplate credibility determinations).

In early 2018, Wyman fired Brotzman for falsifying inspection reports. (Wyman Ex. 68). When confronted with this fact on the stand, Brotzman testified that he was fired for a "quality issue." (Tr. 755). However, the ALJ credited Tim Brink's testimony that he was actually fired for falsifying inspection reports. The ALJ still credited Brotzman's other testimony, claiming he did not lie because "neither reason [for his termination] reflects well on Brotzman." ALJ Dec. at 5. The issue, however, is not whether Brotzman's testimony reflects well on him—the issue is whether he could give any credible testimony. After lying about his termination, any other testimony he gave is suspect where: (1) there is no further corroboration of his claims; and (2) his testimony is not bolstered by any demeanor findings.

Moreover, the ALJ ignores that when Wyman's counsel confronted Brotzman with his lie on the stand, Brotzman doubled-down on his initial prevarication. Brotzman was presented with his termination letter outlining the basis for his termination. (Tr. 835:21-25; 836:1-11; Wyman

Ex. 68). Tim Brink testified he went over the letter in detail with Brotzman at the time of discharge. (Tr. 835-37). Brotzman was shown the letter and after reviewing the letter continued to claim (1) had never seen this letter; (2) was given different reasons for his termination; and (3) continued to deny that he falsified inspection reports.⁵

The fact Brotzman continued to misstate the history and objective facts surrounding his termination undermines any basis for credibility about any other testimony he gave. By mischaracterizing Brotzman's testimony and continued lies on the stand, the ALJ made an arbitrary credibility resolution and elevated Brotzman's contrary testimony over the testimony of the other employees who collected the decertification petition. NLRB v. Elias Bros. Big Boy, Inc., 327 F.2d 421 (6th Cir. 1964) (refusal to credit prejudiced testimony that is against the weight of the evidence). The ALJ's claim that Brotzman is a credible witness is unsupportable. The Board should reverse the ALJ's findings.

C. Berlew and Shovlin gave credible testimony and the ALJ never cites any legitimate reasons to discredit either witness.

The ALJ refused to credit aspects of Berlew and Shovlin's testimony concerning their collection of seven of the twenty three names on the petition. ALJ Dec. at 6-9. In so doing, the ALJ creates extra record red-herrings to undermine the petition. Each of these credibility resolutions is based on the ALJ's own conjecture concerning the collection of the petition.

First, the ALJ claims that Berlew's testimony should be discredited because he should have been "sent back" by his personal attorney to re-collect signatures because there was "no rush." ALJ Dec. at 9. But, this speculation has no rational connection to whether Berlew gave

⁵ "O. And the Company found that of the 22 products and reports that it reviewed, you have forged 12 of them or falsified 12 of them; isn't that right?

A. No ma'am, that's not right.

O. It isn't?

A. No. I did that job just how I was trained to do it when I started in 2012." (Tr: 764:20-22).

believable testimony on the record. Moreover, the ALJ also ignores Berlew's testimony that there was urgency because he was going on medical leave for cancer treatment and surgery in November 2016. (Tr. 171:24-25) ("Yes. I knew I was going out for surgery, and I wanted to get the petition finished before I was out of work.").

Second, the ALJ failed to credit Berlew's testimony that he presented the entire petition to Mikolosko, Brotzman, and Wallace on the basis that Shovlin also obtained signatures on October 19 and 20. ALJ Dec. at 6. According to the ALJ, the fact that Berlew and Shovlin both obtained signatures on the same days is "proof" neither of them had the complete petition in their possession while soliciting signatures. *See* ALJ Dec. at 6 n.9 ("Either one or the other had page 1 of the document on October 19 and 20, but not both.").

This guesswork is nonsense unsupported by the record. It is critical to note that Shovlin and Berlew work separate hourly shifts at Wyman. Shovlin works the third shift, which runs from 10:00pm-6:00am. (Tr. 756:9). Berlew works the first shift, which runs from 6:00am-2:00pm. (Tr. 756:11). Given they work different shifts and share a break room, it is absurd why the ALJ claims not to believe that employees can pass a manila envelope back and forth as they come or go from different work shifts. To authenticate signatures, a petitioner should not have to testify and prove a chain of custody akin to a criminal trial as to who is in possession of a petition and when. *Levitz* simply requires that employees testify that they recognize or witnessed the signatures on the petition. Importantly, the ALJ cites *no* documentary evidence or testimony proving that Berlew did not have the complete petition when he collected signatures from Mikolosko, Brotzman, and Wallace. The ALJ simply makes the counterfactual inference that Berlew could not have possessed the entire petition when he collected signatures.

But, the record shows that Berlew would have had the petition on the morning of October 14 to collect Mikolosko's signature. Shovlin, Crispell, and Finch all testified they signed the petition at Shovlin's car during the third shift on October 14 (this is likely after midnight, since third shift starts at 10:00pm and they were on a break). The ALJ credited this testimony. ALJ Dec. at 6.

Shovlin then testified he gave the entire petition back to Berlew after collecting the signatures on October 14 (Tr. 806:2-8). Berlew corroborated this testimony. (Tr. 177). Berlew had the entire petition when he solicited Mikolosko's signature on October 14 and Brotzman's signature on October 19. The ALJ cannot credibly rule that he did not have the petition the mornings of October 14 and 19. Yet, the ALJ still ruled that Brian Mikolosko's signature was not established because Berlew did not give credible testimony on this point. ALJ Dec. at 6, 8.

Based on Berlew's testimony that he obtained Brotzman's signature on October 19, the ALJ claims that there is no plausible way that Shovlin could have also possessed the first page of the petition on October 19 and 20. The ALJ ruled: "For this petition to be valid there would have to be evidence that Berlew presented the entire packet to Brotzman on October 19 and then gave it back to Shovlin to obtain the signatures of Petorak, Filipkoski, and Cook and got it back on October 20 to obtain the signature of Bob Wallace, who signed page 3 on the same day as Filipkoski and Cook." ALJ Dec. at 6-7.

The ALJ again conjures a discrepancy where there is none. Shovlin credibly testified that he received the petition from Berlew on October 19. (Tr. 812:8-14) ("[Petorak] actually said I heard that there was a petition going around against the Union to do away with the Union and I would be interested on [sic] putting my name on there; would there be any way you can get that for me? And at the time, Bill Berlew had this piece of paper, so I had got the paper in the

envelope, and that's when I retained Joseph Petorak, Byron Filipkoski, Greg Cook."). Shovlin then testified that he collected Petorak's signature in a Dunkin' Donuts parking lot before work on October 19 (Tr. 819:9-15). Shovlin also testified that later that shift (now past midnight) he collected Filipkoski and Cook's signatures, which were properly dated on October 20. (Tr. 819:16-17). Shovlin also testified *multiple times* that he had the entire petition and watched all three signatories read the first page before signing it. (Tr. 814:3-7, 815:6-11; 817:11-14; 818:4-6; 820:16-22). Shovlin then testified that "like the next day this went back to Bill Berlew." (Tr. 812:24-25).

Thus, the ALJ made another baseless inference that was not supported by the evidence. The ALJ's description of events—based completely upon his own suppositions—is without support in the record and defies the logical and persuasive inferences taken from the consistent testimony.

The ALJ then claims that Shovlin gave "no convincing explanation as to why Petorak, Filipkoski, and Cook signed on page 3, when there were 2 empty signature lines on page 2." ALJ Dec. at 7. But, the ALJ erred again in making an unexplained credibility resolution. Shovlin explained the employees either mistakenly assumed the second page was full, thus necessitating a signature on the third page, or the second and third pages of the petition were mixed up when he was presenting it to the employees. (Tr. 819-20). The fact two lines were left blank cannot undermine the consistent testimony given that the first page of the petition was always present and that every employee understood he was signing a withdrawal petition.

In addition, the ALJ refused to credit Berlew's testimony that he presented the entire petition, including the language about decertification, to Wallace. ALJ Dec. at 7. ("Since I credit Brotzman, as opposed to Berlew, I conclude that Respondent has not established that Bob

Wallace signed anything other than a blank sheet of paper"). But, Brotzman was not present when Berlew presented the petition to Wallace. Nor did Brotzman offer any testimony concerning any other employee signing the petition. At most, Brotzman's incredible testimony only establishes that *he* may not have understood what the petition was for. Given Brotzman lied on the stand, his testimony should be discredited and ignored. Brotzman's testimony about his own signature, however, does not contradict Berlew's testimony concerning Wallace's signature. Simply put, Berlew gave uncontradicted testimony concerning Wallace's signature. There is nothing in the record to suggest that Berlew did not have the entire petition on October 20, and that he did not present the entire petition to Wallace for his signature. The ALJ's implausible credibility resolution, based on non-existent contradictory testimony, cannot be upheld. *See, e.g.*, *CPL (Linwood) LLC*, 364 NLRB No. 154, slip op. 4, n.5 (Nov. 30, 2016) ("Waugh's testimony is also uncontradicted and therefore credited").

Lastly, the ALJ oddly claims there is no evidence authenticating the signature of Jonathan Buselli or the circumstances under which he signed the petition. ALJ Dec. at 7 n.10-11. However, both Shovlin and Josh Antosh testified that they received the petition from Buselli with his signature on it. The ALJ is wrong to even question this signature because the Board has long held that "the Board will also accept as authentic any authorization cards which were returned by the signatory to the person soliciting them even though the solicitor did not witness the actual act of signing." McEwen Mfg. Co., 172 NLRB 990, 993 (1968). The ALJ again relies on an easily rebuttable red-herring.

III. The petition was valid for withdrawing recognition.

Given all of this, the ALJ was wrong to rule that the petition could not provide a good-faith basis for withdrawal because it only contained the decertification language on its first page (with the exception of the final signature from Kevin Foster). However, a petition need not be unambiguous to be relied on for withdrawal; all that is legally required is to show by the preponderance of the evidence that employees wanted to withdraw support from the union. Wurtland Nursing & Rehab. Ctr., 351 NLRB 817 (2007). In Wurtland, the Board found Levitz does not require that the evidence proving loss of majority support be "unambiguous." Rather, an employer must prove loss of majority support only by a preponderance of the evidence. This standard "simply requires the trier of fact to believe that the existence of a fact is more probable that its nonexistence." Id. at 818. Here, the petition language is clear and unambiguous. Moreover, any ambiguity was resolved by the overwhelming weight of the credible testimony from nearly every employee that the cover sheet of the petition was present and that employees signed the petition after reading the cover page and understanding its purpose.

This case is not like *Highlands Regional Medical Center*, 447 NLRB 1404 (2006). There, petition language was too ambiguous to support a withdrawal because there was employee testimony that several of the employees believed the purpose of the petition was solely to obtain an election. *Id.* at 1406. In contrast, here, every employee who testified (with the sole exception of Brotzman's biased and self-interested version) said he signed the petition (or presented the petition to other employees) with the first page of the petition present or attached to the succeeding pages. Moreover, every other employee who testified credibly about signing the petition reaffirmed he did not want USW representation at that time. Simply put, the employees

gave credible testimony that everyone who signed the petition knew precisely its purpose: to get rid of the Union. By a preponderance of the evidence, it is more probable than not that a majority of Wyman employees signed the petition to rid themselves of USW representation.

IV. Even if Wyman improperly withdrew recognition, an election is the proper remedy.

Even assuming, arguendo, that Wyman's withdrawal of recognition was improper (which, as discussed in detail above, it is not), the ALJ erred by imposing an order requiring Wyman to bargain with the Union. ALJ Dec. at 17-19. To the extent Board law currently requires a bargaining order as a remedy for a Section 8(a)(5) violation, it should be changed and overruled. The Board should adopt the three-part test articulated by the D.C. Circuit.⁶

"[A] bargaining order is not a snake-oil cure for whatever ails the workplace[.]" Avecor, Inc. v. NLRB, 931 F.2d 924, 938-39 (D.C. Cir. 1991). It therefore should be prescribed only when the employer has committed a "[h]allmark violation" of the Act. Id. at 934, 936. It should not be imposed if the violation is "far from serious." Skyline Distribs. v. NLRB, 99 F.3d 403, 410 (D.C. Cir. 1996). Severity depends on whether the ULP was "the genesis of [the] employees' desire to rid themselves of' the union, Daisy's Originals, Inc. v. NLRB, 468 F.2d 493, 502 (5th Cir. 1972), and whether it was so "flagrant" that an election cannot fairly be held, id. at 503 (internal quotation omitted).

This case is similar to Scomas of Sausalito v. NLRB, 849 F.3d 1147 (D.C. Cir. 2017). In Scomas, employees collected a majority decertification petition, filed it with the NLRB region for an election, and gave a copy of the petition to their employer, asking it to withdraw

⁶ That three part test balances: (1) the employees' Section 7 rights of self-organization and collective bargaining; (2) whether other purposes of the Act override the rights of employees to choose their bargaining representatives; and (3) whether alternative remedies are adequate to remedy the violations of the Act. See generally Scomas of Sausalito v. NLRB, 849 F.3d 1147 (D.C. Cir. 2017).

recognition. *Id.* at 1147. Before the employer withdrew recognition, the union persuaded six employees to sign a form stating they revoked their decertification signatures. *Id.* at 1153. Without those six signatures, the decertification petition lost majority support, but was still supported by well over 30% of the bargaining unit. *Id.* at 1158. The union concealed the employees' revocation from the employer (and the employee who filed for a NLRB election). The employer withdrew recognition in good faith based on the majority petition and, based on this withdrawal, the petitioner withdrew her election petition. *Id.*

Six days later, the union filed unfair labor practice charges claiming the employer unlawfully withdrew recognition because the union still maintained majority support. The Board found that the employer violated the Act and imposed a bargaining order to prevent the employer and the dissenting employees from "raising a question concerning the Union's majority status during the required bargaining period." *Id.* at 1154. The D.C. Circuit reversed the Board's bargaining order, noting that an "affirmative bargaining order is an extreme remedy, because according to the time-honored board practice it comes accompanied by a decertification bar that prevents employees from challenging the Union's majority status for at least a reasonable period." *Id.* at 1156 (quoting *Caterair Int'l v. NLRB*, 22 F.3d 1114, 1122 (D.C. Cir. 1994)). The Court even noted that the appropriate remedy for such a situation is to order an election when more than 30% of the employees still support the petition. *Scomas*, 849 F.3d at 1156.

Even if the petition did not command a majority, the ALJ still found fifteen of the fortythree employees objectively supported the Union's decertification. As more than 30% of the unit

⁷ Interestingly, the Board can take judicial notice of its own records to see that when an election was finally held in *Scomas* (instead of an oppressive bargaining order being crammed onto the employees), the union lost by an overwhelming vote of 37-12. Case No. 20-RD-215834.

supports getting rid of the Union, there is a substantial question concerning representation that should be decided by an election.

Given the still substantial opposition to the Union, imposition of a bargaining order would impermissibly undermine the Section 7 rights of the Wyman employees. The ultimate issue in this case is the employees' right to be represented by an organization of their own choosing. "The fundamental policies of the Act are to protect employees' rights to choose or reject collective-bargaining representatives, to encourage collective bargaining, and to promote stability in bargaining relationships." *HTH Corp.*, 356 NLRB 1397, 1428 (2011),. A bargaining bar would prevent the Wyman employees from "dislodg[ing] the union" no matter "their sentiments about it." *Scomas*, 849 F.3d at 1156 (quoting *Caterair Int'l*, 22 F.3d at 1122). Given the substantial evidence that many employees are opposed to Union representation, an election should be the required remedy to any unfair labor practice so all the employees can properly decide for themselves whether or not they wish to be represented by the Union. Imposing a bargaining order "give[s] no credence whatsoever to employee free choice" and "handcuff[s]" the employees "for no good record-based reason." *Scomas*, 849 F.3d at 1158.

V. The ALJ erred by finding that non-hallmark unfair labor practices tainted Berlew's petition.

Despite the number of unfair labor practices alleged by the General Counsel, the ALJ found the Wyman committed only a single violation that tainted the petition. The ALJ found Wyman's alleged failure to bargain over economic proposals coupled with its failure to respond to a comprehensive union proposal impermissibly prolonged bargaining. According to the ALJ, the prolonged bargaining caused dissatisfaction within the unit and tainted any withdrawal petition. ALJ Dec. at 15.

A petition is tainted by an unfair labor practice only when there is a causal relationship between the illegal act and the petition. The causal relationship must significantly contribute to the loss of majority support. *See St. Agnes Med. Ctr. v. NLRB*, 871 F.2d 137, 146-47 (D.C. Cir. 1989) (unfair labor practices must "significantly contribute to [the] loss of majority"); *Tenneco Auto., Inc. v. NLRB*, 716 F.3d 640, 643–44 (D.C. Cir. 2013); *Lee Lumber & Bldg. Material Corp.*, 322 NLRB 175, 177 (1996) ("there must be specific proof of a causal relationship between the unfair labor practice and the ensuing events indicating a loss of support.").

Even in the event that slow bargaining at the table is an unfair labor practice, it is not the type of "hallmark" violation that requires a bargaining order to invalidate the petition. Typically, to invalidate a decertification petition, an unfair labor practice must have a lasting detrimental effect such as employee discharges, withholding benefits, or threats. *JLL Rest., Inc.*, 347 NLRB 192, 193 (2006) (threatening employees with closure and job loss); *Beverly Health & Rehab. Servs., Inc.*, 346 NLRB 1319, 1328-29 (2006) (discharging active union supporter and unilaterally changing hours and vacation); *Goya Foods*, 347 NLRB 1118, 1121 (2006) ("hallmark violations that were highly coercive and likely to remain in the memories of employees for a long time"); *M&M Auto. Grp., Inc.*, 342 NLRB 1244, 1247 (2004) ("changes involved the important, bread-and-butter issues of wage increases and promotions"); and *Overnite Transp. Co.* 333 NLRB 1392, 1392 (2001) (employer committed "hallmark" violations).

The ALJ's findings are not remotely similar to the required hallmark violations. The ALJ did not even find that Wyman engaged in "bad faith" bargaining, only that it refused to promptly respond to proposals about economic matters until non-economic matters were complete.

There is no evidence, however, to conclude that if Wyman exchanged economic proposals or made a comprehensive counter proposal after August 26, the parties would have completed bargaining by the time the petition was collected in October 2016. By the time the petition was collected the parties had still not agreed to many of the *non-economic* terms, some of which they had been bargaining over for months. Yet, despite these unfinished terms that the parties were willingly bargaining over, the ALJ believed bargaining would have been shorter if only the parties included more issues in bargaining. Such a proposition does not accord with the evidence in the case.

Finally, given the ALJ did not find surface bargaining or bad faith bargaining, the petition should not be considered tainted on the basis of failure to discuss certain conditions or exchange of economic proposals. What occurred here is short of the major bargaining violations that occurred in *Prentice-Hall, Inc.*, 290 NLRB 646 (1988). There, the Board found the employer engaged in egregious bad faith bargaining over the course of eleven months and twenty-one sessions which impermissibly tainted a petition. *Id.* at 669-73. The employer demanded a broad management rights clause and a no-strike clause, while refusing to agree to an effective grievance and arbitration procedure. The employer's demands would have had the effect of stripping the union of any effective method of representing the unit. *Id.* at 669-71. Here, Wyman is not insisting on unilateral control over virtually all significant terms of employment, which would leave the Union and employees with few rights or protections. Indeed, bargaining between August 2016 and the November withdrawal actually showed a greater amount of progress than the entire prior year. Based on the record, there is no evidence that the unfair labor practices served as the causal nexus of the petition.

CONCLUSION

Intervention should be granted and the withdrawal of recognition upheld. Alternatively, the Board should reopen the record to allow Berlew to put on his own witnesses and complete the record. Finally and alternatively, the Board should order an election as a remedy to any unfair labor practices it finds.

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September 17, 2018

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief in Support of

Exceptions and Motion to Intervene was filed electronically with the Executive Secretary using

the NLRB e-filing system, and copies were sent to the following additional parties via e-mail as

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